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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-305

BARRY COMDEN and DORIS DAY COMDEN,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

Supreme Court of the United States

October Term, 1978
No. .....

BARRY COMDEN and DORIS DAY COMDEN,
Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioners, Barry Comden and Doris Day Comden, professionally known as Doris Day, respectfully pray that a writ of certiorari issue to the Supreme Court of the State of California to review the final order of that court, entered on April 11, 1978, which upheld the order of Respondent Court requiring the law firm of Loeb and Loeb, and all members and associate attorneys of such law firm, to withdraw from representing petitioners in Los Angeles Superior Court Case No. C 181219 entitled "Comden, etc., et al. v. Doris Day Distributing Company, etc., et al." Also named as respondents herein are Doris Day Distributing Company, a California corporation, LeRoy W. Rodde, Albert Sheppard, Marvin Valencia and Anthony Strammiello. These parties moved Respondent Court for the

order disqualifying Loeb and Loeb, and were referred to in the appellate proceedings below, and will be referred to herein, as "real parties in interest."

Opinions Below.

The opinion of the Supreme Court of the State of California is reported below at 20 Cal. 3d 906, 145 Cal. Rptr. 9, and is set forth in Appendix A hereto. The opinion of the Court of Appeal, Second Appellate District, State of California, was originally reported below at 69 Cal. App. 3d 453, but was superseded pursuant to Rule 976(d), California Rules of Court, when a hearing was granted by the Supreme Court of the State of California. The opinion of the Court of Appeal is set forth in Appendix B hereto.

Jurisdiction.

The opinion of the Supreme Court of the State of California was filed April 11, 1978. A petition for rehearing was timely filed on April 26, 1978, and was denied by an order entered on May 25, 1978, at which time the decision appealed from became final.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

Questions Presented.

1. Does the order of Respondent Court, dated February 10, 1977, *nunc pro tunc* as of February 2, 1977, requiring the law firm of Loeb and Loeb, and all members and associate attorneys of such law firm to withdraw from representing petitioners in Los Angeles Superior Court Case No. C 181219, entitled "Comden, etc., et al., v. Doris Day Distributing Company, etc., et al.," (hereinafter the "underlying action"), because of the possibility that a non-litigating member of the firm might be a witness at trial, violate petitioners' due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution, by depriving petitioners of their right to be represented by counsel of their choice in state court civil litigation?

2. Does the order of Respondent Court, dated February 10, 1977, *nunc pro tunc* as of February 2, 1977, requiring the law firm of Loeb and Loeb, and all members and associate attorneys of such law firm to withdraw from representing petitioners in the underlying action, violate petitioners' rights of free speech, association, and petition as guaranteed by the First and Fourteenth Amendments, by depriving petitioners of their right to be represented by counsel of their choice in state court civil litigation?

Constitutional Provisions, Statutes and Rules Involved.

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The First Amendment to the Constitution of the United States.

3. California Business and Professions Code Section 6076, set forth in Appendix C, post.

4. Rules of Professional Conduct of the State Bar of California, Rule 2-111(A)(4), which appears following Section 6076 of the California Business and Professions Code, (West Supp., 1978), set forth in Appendix D, post.

Statement of the Case.

This case, like *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *Ohralik v. Ohio Bar Ass'n,* 56 L. Ed. 2d 444 (1978) and *In re Primus,* 56 L. Ed. 2d 417 (1978), challenges the power of a state court to apply a state bar rule of professional conduct in such manner as to deprive petitioner of significant federal constitutional rights. Petitioners herein are plaintiffs in the underlying action, which is a civil suit brought by petitioners against real parties in interest. In the underlying action, petitioners, represented by Loeb and Loeb, sought to enjoin real parties in interest from using Mrs. Comden's name, image and likeness in connection with their business, for a declaration that petitioners had lawfully terminated a contract between petitioners and real parties in interest, for damages and for civil penalties. [Record, Document 11, Exhibit "A-1".]

On January 26, 1977, the date scheduled for a hearing on petitioners' application for preliminary injunction, real parties in interest filed a motion to disqualify Loeb and Loeb as attorneys for petitioners in the underlying action. The motion was based on State Bar of California Rule of Professional Conduct 2-111(A)(4)[1] which provides that if an attorney knows or should know that he or a member of his firm "ought" to testify on behalf of his client at trial, the attorney should withdraw from the representation.

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[1]State Bar of California Rules of Professional Conduct are given the force of law in California by virtue of California Business and Professions Code §§6076-6077. The provisions of Rule 2-111(A)(4) are substantially similar to American Bar Association Code of Professional Responsibility Disciplinary Rule 5-102(A).

Real parties in interest pointed to the fact that four Loeb and Loeb attorneys had submitted declarations in support of petitioners' application for a preliminary injunction. [Record, Document 11, Exhibit "B-1".] Petitioners opposed the motion on the grounds that it was highly unlikely that any of the attorneys would be witnesses at trial, and that the case came within the exceptions to the rule in that the testimony of the attorneys was on matters that were formal, or on matters where the effect of the testimony was cumulative. The motion was also opposed on the ground that disqualification would work a substantial hardship on petitioners, and on the ground that real parties in interest were not prejudiced by Loeb and Loeb's continued representation of petitioners. [Record, Document 11, Exhibit "B-4".]

The hearing on the preliminary injunction was postponed until January 31, 1977, and Respondent Court specifically informed the parties that it would not rule on the disqualification motion until after the hearing on the preliminary injunction.

On February 10, 1977, after disposing of the application for preliminary injunction, Respondent Court entered an order *nunc pro tunc* as of February 2, 1977, (hereinafter, the "disqualification order") which required the firm of Loeb and Loeb and all members and attorneys associated with that firm to withdraw from the representation of petitioners in the underlying action. [Record, Document 11, Exhibit "D".] The Court based its order on the finding that it could not say with certainty that Marvin Greene, a partner of Loeb and Loeb whose affidavit had been filed in support of the application for preliminary injunction, would

not be called as a witness at trial. [Record, Document 11, Exhibit "C".] Mr. Greene is a member of the business department of Loeb and Loeb and would not participate as trial counsel in any stage of the underlying action.

As of February 10, 1977, no responsive pleading to the complaint had been filed in the underlying action, and no discovery proceedings had been conducted by any party.

Pursuant to California procedural law, petitioners instituted a special proceeding in the Court of Appeal, Second Appellate District, State of California, on February 23, 1977, by applying for a writ of prohibition, or in the alternative for a writ of mandate, to prevent Respondent Court from enforcing the disqualification order. [Record, Document 1.] The disqualification order was stayed by an alternative writ of mandate issued by the Court of Appeal on March 2, 1977 [Record, Document 2], and on March 18, 1977, the Court of Appeal ordered Respondent Court to vacate the disqualification order. [Appendix B.] The Supreme Court of California, upon petition of the real parties in interest, granted a hearing on May 26, 1977.

The Supreme Court of California rendered its decision in this case on April 11, 1978. The majority opinion, subscribed to by four of the seven members of the Court, dissolved the writ of mandate that had been issued by the Court of Appeal, thereby reinstating the disqualification order. Although the Court recognized that the case involved petitioners' important constitutional right to counsel of their own choice [post, Appendix A at p. 8], the majority did not justify its decision on the basis of any alleged harm to real parties in interest, as had been urged throughout the

proceeding. Instead, the Court's holding was based on the proposition, not previously advanced by any party, that its interference with the petitioners' rights was justified by the state's interest in maintaining ethical standards of professional responsibility. [Post, Appendix A at p. 8.] It reasoned that where an attorney, not himself trial counsel but a member of trial counsel's firm, testifies, the opportunity still exists for opposing counsel to argue that the attorney-witness' stake in the litigation influences his objectivity, that the consequent appearance of impropriety may lead the public to be skeptical of attorneys as witnesses, thereby diminishing the public's respect and confidence toward the profession, and impugning the integrity of the judicial process. [Post, Appendix A at pp. 3-4.] The Court came to this conclusion without any examination of whether the rule, as construed and applied to petitioners in this case, did in fact further the state's interest in maintaining the integrity of the judicial process and of the Bar. Neither did the Court engage in any detailed analysis of whether, even assuming that there was some connection between the disqualification of the attorney-witness firm in the underlying action and the integrity of the judicial process, the state's interest was of sufficient magnitude in this case to justify interference with petitioners' constitutional rights.

On April 26, 1978, the Comdens filed a petition for rehearing with the Supreme Court of the State of California, specifically addressing its failure to give more than superficial consideration to the constitutional issues the Court itself had raised, and the Court's incorrect resolution of such issues. The petition for rehearing was denied on May 25, 1978, without opinion.

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The decision below, by requiring Loeb and Loeb to withdraw from representing petitioners in the underlying action, deprives petitioners of counsel of their choice. That deprivation interferes with petitioners' due process right to a fair hearing and First Amendment rights of petition, association, and free speech. Yet the Court below ordered disqualification without examining the state interests proffered to justify such interference, and without determining whether those purported interests could be protected without interfering with the Comdens' rights. Moreover, analysis of the ruling of the Court below discloses not only that the purported state interests do not withstand logical scrutiny, but also that the practical effect of the decision is likely to diminish the public's respect and confidence toward the legal profession, impugn the integrity of the judicial process, and restrict the access of consumers of legal services to effective and inexpensive legal representation.

1. The Disqualification Order Violates the Due Process Rights of the Comdens.

More than forty years ago, this Court, in *Powell v. Alabama,* 287 U.S. 45 (1932), held that the right to appear by counsel in any case, civil or criminal, was essential to due process in the constitutional sense. *Id.* at 68-69. Although this Court has never squarely faced the question of whether the right to counsel includes the right to counsel *of one's own choosing,* other courts have so held. Thus, in *Roberts v. Anderson,* 66 F.2d 874 (10th Cir. 1933), it was held that a

state court, by forbidding a party in a civil action to appear by counsel of her choice and appointing another attorney in his stead, had denied that party her due process right to a hearing. The California Supreme Court has recognized that it is a denial of due process for a court to interfere with a criminal defendant's choice of counsel without adequate justification. *People v. Crovedi,* 65 Cal. 2d 199, 207-208, 53 Cal. Rptr. 284, 417 P. 2d 868 (1966).

Moreover, this Court's recent decisions emphasize that due process requires that a party have a meaningful opportunity to be heard. *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970); *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). Determination of what constitutes a meaningful opportunity "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the government action." *Cafeteria and Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961).

The underlying action involved significant personal interests of petitioners. If they lost, petitioners could possibly become liable for substantial damages. Mrs. Comden's name and reputation would be committed to a business enterprise of highly dubious integrity, against her will. The right to protect one's good name has been recognized by this Court as reflecting concepts at the root of our constitutional system. *Gertz v. Welch,* 418 U.S. 323, 341 (1974). With such grave consequences possible, petitioners ought to be able to retain the most effective counsel possible. To be truly effective, that counsel ought to be counsel whom petitioners trust, with whom they have rapport and agreement

on trial strategy—in short, counsel of their choice. As this Court said in *Faretta v. California,* 422 U.S. 806 (1975):

> "An unwanted counsel 'represents' the [party] only through a tenuous and unacceptable legal fiction." *Id.* at 821.

Just as a defense presented by unwanted counsel for a defendant is not the defense guaranteed by the Constitution, *Faretta, id.,* so too, a hearing through unwanted counsel is not the fair hearing required by the Constitution.

The disqualification order was prejudicial to petitioners in numerous other respects. For example, it resulted in a stay of the underlying action [Record, Document 12] which in turn significantly delayed petitioners' ability to obtain permanent injunctive relief. This could have harmed both petitioners and the public, had real parties in interest continued in business. Even had petitioners permanently abandoned their right to counsel of choice, the underlying action would still have been delayed while new counsel educated themselves in the extensive factual record of the case. Finally, when new counsel were engaged to move ahead with the preparation of the underlying action, in response to the real parties in interest noticing petitioners' oral depositions, that educational process significantly increased the cost to petitioners of protecting their rights.

The disqualification order was therefore a substantial impediment to petitioners' opportunity to obtain a full, fair, and speedy hearing on their rights and obligations with respect to the real parties in interest. The Supreme Court of California erected this impediment to petitioners without any analysis of whether the disqualification will in fact serve those state interests upon which the Court relied for its justification. Such an analysis was called for by this Court's decisions in the due process area. *See Cafeteria and Restaurant Workers Union v. McElroy, supra; Goldberg v. Kelly, supra; Boddie v. Connecticut, supra.* Such an analysis compels the conclusion that the rule adopted by the Supreme Court of California will diminish rather than enhance the public's estimation of the Bar and the judicial process. [Point 4, *infra.*]

2. The Disqualification Order Infringes Petitioners' First Amendment Rights of Free Speech, Petition, and Association.

In *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963), this Court was asked to review an order of the Virginia Supreme Court of Appeals, based on the state code of legal ethics, which sought to enjoin the N.A.A.C.P. from soliciting potential plaintiffs for civil rights lawsuits, in which the plaintiffs would be represented, at no cost to them, by N.A.A.C.P. Defense Fund attorneys. This Court reversed, finding:

> "We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments. . . ." *Id.* at 428-9.

In the following term, this Court upheld, as against a state code of legal ethics, the right of a union to recommend attorneys to its members to handle lawsuits coming under the Federal Employers' Liability Act.[2] *Brotherhood of R. Trainmen of Virginia,* 377

[2] 45 U.S.C. §§1-43 (1970).

U.S. 1 (1964). In so doing, this Court held that the activities of both the union and lawyers accepting employment under the plan were protected by the First Amendment rights of association and petition. *Id.* at 7-8. In *United Mine Workers v. Illinois Bar Ass'n,* 389 U.S. 217 (1967), this Court specifically stated that its holding in *Button* could not be confined to litigation that could be characterized as political expression. *United Mine Workers v. Illinois Bar Ass'n,* 389 U.S. at 221.

> "The common thread running through [the] decisions in NAACP v. Button, Trainmen and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. Michigan,* 401 U.S. 576, 585 (1971); *In re Primus,* 56 L. Ed. 2d at 430 (1978).

The case at bench, unlike the cases cited above, does not raise any issue of solicitation or the state's interest in protecting the public from any evils associated with it. The cases are nevertheless analogous in that the disqualification order prevented petitioners from associating with counsel of their choice to represent them in a lawsuit to protect vital interests. In so doing, it significantly impaired petitioners' ability effectively to petition the courts in protection of their rights [pp. 9-10 *ante*]. Petitioners therefore assert the same First Amendment rights of free speech, association and petition as did the petitioners in *Button* and *Trainmen, supra.*

The California Supreme Court, in upholding the disqualification order, merely cited the state's interest

in upholding the integrity of the Bar and the public faith in the judicial function. It made no inquiry as to whether the disqualification order would in fact serve those ends, or whether the state could achieve those ends without interfering with petitioners' rights. The teaching of *Button, Trainmen,* and *Primus* is that such an examination must be made and that the state's interests must be compelling to justify interference with such important First Amendment rights.[3] The state's interest in regulating the practice of law was found insufficient in those cases; in the case at bench, the state's asserted interest also failed to justify the intrusion on petitioners' rights by Rule 2-111 as applied.

3. The Rationale Proffered for the Disqualification Order Did Not Justify the Interference With Petitioners' Constitutional Rights.

The California Supreme Court attempted to justify the disqualification order on the grounds that "testimony by a member of trial counsel's firm may lead the public to be skeptical of lawyers as witnesses, thereby diminishing the public's respect and confidence toward the profession" and thereby impairing the integrity of the judicial process. [Post, Appendix A, p. 4.] Not only is the argument both factually and legally insupportable; it is inadequate because it allows interference with the clients' rights in situations where there is no threat of harm to the state's interests.

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[3]It should be noted that the California Supreme Court did not even engage in the level of scrutiny which this Court has deemed necessary in cases involving only commercial speech. *See, e.g., Bates v. State Bar of Arizona,* 433 U.S. at 366-379; *Ohralik v. Ohio Bar Assn.,* 56 L. Ed. 2d at 452-456.

The rationale adopted by the Court below first asserts that testimony by a non-litigating member of trial counsel's firm may lead the public to be skeptical of lawyers as witnesses. There is no empirical evidence in the record, and petitioners know of none, which either supports or rebuts this proposition. However, lawyers as well as laymen are subject to the penalty of perjury and lawyers are, if anything, more sensitive to the significance of the penalty. There is no good reason to believe that as a general proposition lawyers will so demean themselves in testifying as to lead the public to become skeptical of all lawyers as witnesses. To the contrary, there is greater circumstantial probability that lawyers, cognizant of the meaning of their oath and the relationship of the role of the witness to the judicial process, will conduct themselves on the stand in such a manner as to bring credit upon the profession and the judicial process.

However, even assuming that testimony by trial lawyers could lead the public to be skeptical of lawyers *as witnesses,* it does not logically follow that this would damage public confidence in attorneys *as a profession* in their normal capacity as advocates and advisors. The logical gap widens where, as in the case at bench, the testimony would be given by a non-litigating member of trial counsel's firm and would concern events to which there were many corroborating witnesses. [Compare Record, Document 11, Exhibit "A-7" with Record, Document 11, Exhibits "A-3", "A-4", "A-10" and "A-23".]

The logical connection between the public's supposed skepticism of attorneys as witnesses and its trust in the judicial process is even more attenuated. It is

difficult to perceive the logic of the proposition that testimony by attorneys who might have a financial stake in the outcome of the cause, measured by their share, if any, of the fees to be earned by their firm, should affect public confidence in the judicial system any more than testimony by other witnesses with even larger stakes in the result, as for example, the parties themselves. Once again, there is no empirical evidence to either support or rebut the proposition. In the absence of such evidence, and in the absence of compelling logical argument, such unexamined assumptions cannot justify interference with petitioners' constitutional rights.

In short, the argument advanced by the Court below to justify infringing petitioners' right to counsel of their own choice is merely a series of leaps of faith. None of the asserted consequences of allowing Loeb and Loeb to continue as counsel for petitioners has any factual basis, nor can any survive logical scrutiny.[4] The teaching of both the due process cases and the First Amendment cases of this Court, discussed above, is that such tenuous and tortured reasoning cannot be used to interfere with the fundamental right of petitioners to be represented by counsel of their choice in a proceeding where vital interests are at stake.

Moreover, even assuming that the state could rationally find that testimony at trial by a member of trial

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[4]Other explanations have been advanced for the rule disqualifying partners and associates of trial counsel. *See ABA Code of Professional Responsibility* Ethical Considerations EC 5-9; *Greenebaum-Mountain Mtg. v. Pioneer Nat. Title Ins.,* 421 F. Supp. 1348 (D. Colo. 1976), appeal dismissed March 29, 1977. The susceptibility of the lawyer-witness to impeachment, the supposed handicap of challenging another trial lawyer's credibility, and the "unseemliness" of arguing one's own credibility hardly justify the drastic step of disqualifying counsel. Moreover, the last two reasons do not obtain where the attorney-witness has no other role in the proceeding.

counsel's firm could impair the public's faith in the judicial system, that finding still cannot justify the disqualification order. That order was entered prior to the completion of pleadings or the taking of any discovery. Except to the limited extent that trial issues may be said to be defined at a hearing on an injunction *pendente lite,* the issues to be tried and the need for testimonial evidence on such issues, had not begun to be determined. Not only was it unclear that Mr. Greene's testimony would be necessary at trial, but it was not even clear that this case would proceed to trial. Thus, when the disqualification order issued, the purported harm which the state sought to avoid was still only a remote possibility, and was conceded by the trial judge to be only a possibility. Such remote possibility of harm cannot justify interference with the Comdens' rights of free speech, association, and petition. *See United Mine Workers,* 389 U.S. at 223-224; *In re Primus,* 56 L. Ed. 2d at 431. Rather, the teaching of these cases, as well as cases like *Button,* 371 U.S. at 438, and *Trainmen,* 377 U.S. at 7, is that the state must regulate in these areas narrowly, to avoid improper infringement on important constitutional rights.

4. The Practical Effect of the Decision of the Court Below.

In order to appreciate the effect which the decision below will have on the practice of law in California, and perhaps elsewhere,[5] it is necessary to remember

[5]The decision below is not an isolated holding. Rather, it is illustrative of an expanding practice among trial counsel to disqualify the opposition *firm* as a litigation tactic, *see, e.g., U.S. ex rel. Sheldon El. Co. v. Blackhawk Htg. & Plmg.,* 423 F. Supp. 486 (S.D.N.Y. 1976); *True-Bite Labs,*

(This footnote is continued on next page)

that the trial court disqualified the attorney-witness' firm, prior to the completion of pleading and the initiation of discovery. Thus, the specific teaching of the decision below is that the motion to disqualify the attorney-witness' firm, already a frequent tactic to delay litigation [*see* footnote 5, *supra*] will now lie where there is a mere possibility that he may testify at trial, subject only to the discretion of the trial level judge.[6] This is nothing less than a broad prophylactic rule which can easily be applied, as it has been in the case at bench, to abridge the constitutional rights of litigants without any showing of substantial potential for harm. Such imprecise regulation is unacceptable where rights of free speech, association, and petition are at stake. *See, Button,* 371 U.S. at 438; *United Mine Workers,* 389 U.S. at 222-223; *In re Primus,* 56 L. Ed. 2d at 431. Assuming a connection between

Inc. v. Ashman, 54 App. Div. 2d 345, 388 N.Y.S. 2d 279 (1976), as well as the opposing *trial lawyer, see, e.g., Draganescu v. First National Bank of Hollywood,* 502 F.2d 550 (5th Cir. 1974); *Harrison v. Coca-Cola Bottling Co.,* 428 F. Supp. 149 (M.D. Pa. 1977). Only in *Greenebaum-Mountain Mtg. v. Pioneer Nat. Title Ins., supra,* 421 F. Supp. at 1352, *et seq.* did the court deal with the question of whether disqualification of an entire firm was warranted. The existence of this developing adversary tactic, and concern that by its use sound ethical principles developed in "conflict" cases may be employed in "attorney-witness" cases so as to overcome substantial justice, has been judicially noted. *See J.P. Foley & Co., Inc. v. Vanderbilt,* 523 F.2d 1357 (2d Cir. 1975) (Gurfein, C.J., concurring); *International Electronics Corp. v. Flanzer,* 527 F.2d 1288, 1289 (2d Cir. 1975); *Greenebaum-Mountain Mtg. v. Pioneer Nat. Title Ins., supra,* 421 F. Supp. at 1352.

[6]Other courts have adopted a more flexible approach and have permitted counsel to participate in pre-trial discovery and preparation of the case. *See, e.g., Miller Elec. Const., Inc. v. Devine Lighting Co., Inc.,* 421 F. Supp. 1020 (W.D. Pa. 1976); *Norman Norell, Inc. v. Federated Department Stores,* C.C.H. 1978-1 Trade Cases, ¶62037 (S.D.N.Y.).

testimony at trial by a member of trial counsel's firm and the public's confidence in the judicial system, the state should be required to draw a much narrower rule to address this problem.[7] The present rule, which allows the trial judge such broad discretion in disqualifying counsel as to permit a "mere possibility" standard to be applied, can only lead to more instances of clients being deprived of the right to effective representation, and more litigation over that right.

Moreover, the ruling below is likely to harm precisely those state interests which the majority sought to protect. As the result of the sweeping discretion given to trial judges by the ruling below, there are now only two ways in which a consumer of legal services can avoid time-consuming and costly litigation over the right to be represented by counsel of choice. The first option is simply not to retain counsel until disputes reach the state of litigation. This could well result in inadequate protection for the client's rights. It could also lead to more lawsuits, as parties to potential litigation will not have the objective views of counsel to help them reconcile differences before commencement of suit. Alternatively, the client can hire one law firm to represent him in matters that are not yet in litigation and another law firm to take over those same matters as soon as they go into litigation. This will drive up the costs of legal services, and inevitably result in delay, which, particularly in injunction matters such as this one, could be detrimental to both the client and the public. In either case, the client will not

[7]For example, a rule which permitted disqualification only after discovery was substantially completed would at least limit interference with the clients' rights to instances where it was reasonably certain the harm would occur.

be served as well, thus damaging the public's faith both in lawyers and in the legal system which compels parties to proceed in that manner.

From the point of view of the practicing lawyer, his professional relationship with the client and his ability to adequately service the client's needs will be seriously disrupted. As a result of the decision below, law firms—be they public agencies, public service, or private—which desire to avoid ethical impropriety and potentially prejudicial delay, may be forced to withdraw as soon as any possibility appears that some member of the firm might be called on to testify concerning the negotiation or documentation of the disputed transactions; pre-litigation negotiation, investigation, warnings or demands; or even events occurring in the course of litigation. One federal district judge has gone so far as to require all attorneys appearing before him to notify him of any such possibility of testimony as soon as it becomes apparent. *Supreme Beef Processors v. Am. Consumer Industries,* 441 F. Supp. 1064 (N.D. Tex. 1977).

The logical extension of such a rule is the creation of a bar of solicitors and barristers, comparable to the system which the English find increasingly unsatisfactory, and are gradually abandoning. Full service law firms will be fractionalized, and the unique ability of such firms to service clients having need for diversified legal services will be lost. Attorneys with long standing and specialized representations, such as counsel for labor unions or employer associations, could find themselves foreclosed from representation of their clients in connection with litigation or arbitration involving agreements negotiated in the presence of firm members. To the extent that members of the legal

staffs of public agencies become potential witnesses, either by negotiating contracts which are the subject of civil disputes, or by being percipient witnesses to confessions or other events involved in criminal proceedings, the rule could disturb the functioning of those offices as well. Small firms engaged to handle routine matters for private individuals, such as the purchase of a residence, could find themselves unable to handle the resulting litigation over the purchase. Litigation counsel will have good reason to be wary of attempting to seek adjustment of disputes by persuasion or negotiation before filing suit for fear of disqualification. The decision below clearly indicates that Loeb and Loeb was retained only after a dispute had risen over the contract, and that the testimony of Mr. Greene which was the basis for the disqualification order concerned events that occurred in the course of attempting to settle the dispute without a lawsuit. [Post, Appendix A at pp. 2-3.] Once again, the practical effect of the ruling of the Supreme Court of California will be to discourage settlement of disputes by negotiation and to compel the duplication of legal services, with consequent duplication of expense to the consumer of legal services at all levels.

In the instant case, the granting of the disqualification motion has resulted in a long delay in a case where, at the time the motion was made, delay might have resulted in irreparable injury to the name and reputation of Mrs. Comden. Fortunately, as far as petitioners are aware, the real parties in interest are no longer doing business. Absent this fortuitous event, the delay inherent in the disqualification ruling would have had significant impact upon petitioners' effort to obtain prompt injunctive relief.

In short, the practical effect of the decree below is likely to be waste, expense, delay, and needless litigation for consumers of legal services. Such a result is likely to harm the public's opinion of both lawyers and the legal system,[8] thereby causing the very evil which the majority of the Court below sought to prevent. Thus, the state interests at stake here, rather than justifying the infringement of petitioners' constitutional rights, actually militate against disqualification of counsel in this case.

The deleterious effect of the motion for disqualification based on the possibility of testimony by a member of trial counsel's firm is even more distressing when it is observed that, other than the decision appealed from, only one of the many reported decisions on such motions makes even passing mention of the client's right to counsel of choice. *See Ceramco, Inc. v. Lee Pharmaceuticals,* 510 F.2d 268, 271 (2d Cir. 1975); *compare Emle Industries, Inc. v. Patentex, Inc.,* 478 F.2d 562, 565 (2d Cir. 1973), a conflict of interest case. Only the District Court in *Greenebaum-Mountain Mtg. v. Pioneer Nat. Title Ins., supra,* scrutinized the reasons offered for the rule and sought to balance those interests against the rights of the client.[9]

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[8]Recognizing this possibility, the State Bar of California filed a brief Amicus Curiae in Support of Petitioners, urging the Supreme Court of California not to disqualify counsel for petitioners. *See* Record, Document 13, especially at p. 25.

[9]Cases where counsel is disqualified because of possible testimony by himself or a member of his firm must be distinguished from disqualification based on conflict of interest, such as *Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975). In the latter type of case, the right to counsel of choice must be balanced against the right of the former client to protection of confidential communications.

Conclusion.

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

HOWARD I. FRIEDMAN,
Attorney for Petitioner.

ROBERT A. HOLTZMAN, Esq.,
PETER J. NIEMIEC, Esq., and
LOEB AND LOEB,
of Counsel.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California.

Barry Comden et al., Petitioners, v. The Superior Court of Los Angeles County, Respondent; Doris Day Distributing Company et al., Real Parties in Interest. L.A. 30787.

Filed April 11, 1978.

Doris Day Comden and Barry Comden seek mandate to compel respondent court to vacate its order requiring petitioners' attorneys to withdraw from their representation of petitioners in an action for injunctive relief and breach of contract. The question presented is whether respondent court abused its discretion in ordering withdrawal pursuant to California Rules of Professional Conduct, rule 2-111(A)(4) when the court concluded that a member of the attorneys' firm ought to be called as a witness for plaintiffs at trial of the cause.[1]

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[1]The California Rules of Professional Conduct, binding on all members of the State Bar (see 3B West's Ann. Bus. & Prof. Code (1974 ed.) foll. § 6076, at p. 365), were approved by this court effective 1 January 1975. (14 Cal.3d, at Rules pp. 1-25.) Rule 2-111 governs withdrawal from employment and rule 2-111(A)(4) provides: "(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm [, if any, shall not continue representation in the trial, except that he] may continue the representation and he or a lawyer in his firm may testify in the following circumstances; [¶] (a) If the testimony will relate solely to an uncontested matter; or [¶] (b) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or [¶] (c) If the testimony will relate solely to the nature and value

(This footnote is continued on next page)

We conclude the court acted within its discretion in ordering withdrawal.

In February 1976 Doris Day Distributing Company (DDDC), the real party in interest, contracted with petitioners to distribute pet products bearing the name and likeness of Doris Day. Petitioners were represented by Attorney Stanley Chernoff throughout contract negotiations with DDDC.

Disagreement soon developed, petitioners claiming DDDC was not meeting its contractual duties to them. In June 1976 Chernoff associated Marvin Greene, corporate law and securities regulations specialist and partner in the law firm of Loeb and Loeb, to assist in resolving petitioners' disputes with DDDC.

In November 1976 petitioners, through Loeb and Loeb Attorney Robert Holtzman, filed in respondent court a complaint alleging breach of numerous contractual covenants and seeking to enjoin DDDC from continuing to use the name and reputation of Doris Day in soliciting potential investors, distributors or customers.

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of legal services rendered in the case by the lawyer or his firm to the client; or [¶] (d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The bracketed language does not appear in the text of the rule as proposed to and adopted by this court. (See Bus. & Prof. Code, § 6076.) The State Bar of California, in its brief as amicus curiae in support of petitioners, claims such language was omitted due to a typographical error which is claimed to have occurred after the rule was drafted by the State Bar and before approval by this court. No challenge is made to such assertion by the State Bar. However, our reading of the rule without the bracketed material is consistent with the text including such material, and we thus deem there to be no issue raised by the omission.

During the course of litigation petitioners sought a preliminary injunction to enjoin DDDC from using Day's name in its business activities. In support of petitioners' application, Greene filed a declaration detailing his meetings with representatives of DDDC as he and Chernoff attempted to resolve matters. Greene stated he had heard Anthony Strammiello, a DDDC investor, say he had received a 50 percent equity interest in the company in return for a $150,000 investment. The contract between petitioners and DDDC explicitly prohibited such transfer of interest in DDDC. In a second declaration another Loeb and Loeb attorney stated in support of the application that DDDC representatives had refused to allow the inspection of corporate books as authorized by the contract.

At the hearing for preliminary injunction DDDC moved for an order disqualifying Loeb and Loeb as petitioners' trial counsel, arguing that members of the firm who had made declarations in support of the application were likely to testify at trial. The court granted DDDC's motion, stating "I cannot see how I can say with any degree of security or in good conscience that Mr. Greene will not be called as a witness."

An examination of the purposes underlying rule 2-111(A)(4) supports the court's ruling. An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate. While the harm recedes when the attorney-witness is not himself trial counsel but only a member of trial counsel's firm, the opportunity still exists for opposing counsel to argue the attorney-witness' stake

in the litigation through his law firm influences his objectivity. (See ABA Code of Prof. Responsibility, EC 5-9; Sutton, *The Testifying Advocate* (1963) 41 Tex. L. Rev. 477.)

Significantly, the prohibition seeks to avoid the *appearance* of attorney impropriety. The language of rule 2-111(A)(4) closely parallels that of ABA Code of Professional Responsibility Disciplinary Rules, rules 5-101(B), (1) through (4) and 5-102(A) and (B). In disqualifying a law firm pursuant to ABA rule 5-102(A) a federal court has cautioned we must be mindful of the possibility that testimony by a member of trial counsel's firm may lead the public to be skeptical of lawyers as witnesses, thereby diminishing the public's respect and confidence toward the profession. "Where doubt may becloud the public's view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to ensure that the standards of ethics remain high." (U.S. ex rel. Sheldon El. Co. v. Blackhawk Htg. & Plmg. (S.D.N.Y. 1976) 423 F.Supp. 486, 489.)

Petitioners argued before respondent court that the order was premature, suggested that subsequent discovery might eliminate need to call Greene as a witness, and offered voluntary withdrawal by Loeb and Loeb if discovery failed to rule out the usefulness of Greene's testimony. Petitioners thus suggest the likelihood of the need of an attorney's testimony is the essential factor governing withdrawal. This is the main ingredient which the court must consider. However, the rule requires withdrawal when the attorney "knows or should

know that he . . . ought" to testify.[2] (Cal. Rules Prof. Conduct, rule 2-111(A)(4), fn. 1, *ante;* J. P. Foley & Co. v. Vanderbilt (2d Cir. 1975) 523 F.2d 1357, 1359.) We deem the rule to require that the court first consider whether the attorney's testimony will be necessary to protect his client's interests and, if it concludes such testimony will likely be necessary, that it order a timely withdrawal consistent with minimizing prejudices which may result from the substitution of counsel. Whether an attorney ought to testify ordinarily is a discretionary determination based on the court's considered evaluation of all pertinent factors including, inter alia, the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established. (See Miller Elec. Const., Inc. v. Devine Lighting Co. Inc. (W.D.Pa. 1976) 421 F.Supp. 1020, 1021, fn.2.)

Mandamus will not lie to control discretion of a court or to compel its exercise in a particular manner except in the rare instance when the facts command discretion be exercised in but one way. (O'Bryan v. Superior Court (1941) 18 Cal.2d 490, 496; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 79, p. 3856.) Attorney Greene's declaration was to the effect he had heard statements which, if true, establish a breach of contract by DDDC. While others present at the meeting also reported hearing the statements described by Greene, it cannot be said that

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[2]"Ought" is defined inter alia as "used to express moral obligation, duty, or necessity . . . or what is correct, advisable, or expedient. . . ." (Webster's Third New Internat. Dict. (1961).)

under the facts the trial court could *only* have concluded Greene's testimony would not be necessary at trial, particularly when Strammiello denied having made the statement reported by Greene and contradictory declarations were offered by DDDC.

When it is impractical to determine with certainty whether an attorney ought to testify, the trial court ordinarily must make a determination notwithstanding the uncertainty, as delay in making a decision may well prejudice the client. (See Miller Elec. Const. Inc. v. Devine Lighting Co. Inc., *supra,* 421 F.Supp. 1020, 1023; ABA Code of Prof. Responsibility, EC 5-10.) Although the court in *Miller* determined that delaying a withdrawal decision would not under the circumstances in that case prejudice any party, the court's contrary conclusion here was clearly within the scope of its discretion, the trial judge stating "delaying the decision creates the issue of hardship."

Petitioners urge in the prevailing circumstances, rule 2-111(A)(4) is inapplicable under one or more of the exemptions provided. However, Greene's anticipated testimony does not relate to an uncontested matter (Cal. Rules Prof. Conduct, rule 2-111(A)(4), subd. (a)), nor solely to a matter of formality (*id.*, subd. (b)), nor solely to the nature and value of legal services rendered in the case (*id.*, subd. (c)). His testimony will be challenged by more than one opposing witness, and will tend to establish a breach of contract and a basis for its termination.

Rule 2-111(A)(4) might allow continued representation by Loeb and Loeb if a coerced withdrawal would create substantial hardship for petitioners because of the distinctive value of service by the law firm.

(*Id.*, subd. (c).) Petitioners will doubtless be inconvenienced by Loeb and Loeb's withdrawal. However, inconvenience falls short of "substantial hardship . . . because of the *distinctive* value . . . of the firm as counsel." (*Id.*, subd. (d); emphasis added.) Holtzman, while acknowledging some of his work product can be transferred to new counsel, contends his "impressions and rapport with the people involved" cannot be so transferred. He argues petitioners will be forced to incur large legal fees to secure new counsel, and will lose the securities regulations expertise of Greene.

Greene, however, is not petitioners' trial counsel and they will not lose his expertise. To the contrary, withdrawal of Greene's firm should enhance Greene's usefulness as a witness for petitioners as he will no longer be as vulnerable to impeachment for interest. In addition, the ability to establish client and witness rapport and to "form impressions" after legal research is not unique to Holtzman or to other Loeb and Loeb attorneys. If we were to hold that interview, research, and preliminary discussion on trial strategy are sufficient to cloak a firm with such "distinctive value" that a loss of its service results in substantial hardship within the meaning of the rule, the latter will be consumed by exception.

In a case involving disqualification of an attorney who earlier represented an adverse interest, the court stated: "We realize . . . that Rabin's disqualification may inconvenience plaintiffs, who undoubtedly chose him in the belief he was the best attorney to prosecute their claims . . . [D]espite his considerable talents, Rabin is not the only member of the patent bar qualified to capably represent these plaintiffs." (Emle Industries Inc. v. Patentex, Inc. (2d Cir. 1973) 478 F.2d 562,

574-575.) Obviously, Loeb and Loeb is not the only firm qualified to capably represent these petitioners, nor have petitioners demonstrated the distinctive value of their attorneys' services over those to be rendered by another firm of good quality.

It would be naive not to recognize that the motion to disqualify opposing counsel is frequently a tactical device to delay litigation. (See U.S. ex rel. Sheldon El. Co. v. Blackhawk Htng. & Plmb., *supra,* 423 F.Supp. 486.) "[J]udicial scrutiny [is required] to prevent literalism from possibly overcoming substantial justice to the parties." (J. P. Foley & Co. Inc. v. Vanderbilt, *supra,* 523 F.2d 1357, 136 conc. opn. Gurfein, C.J.) However, ultimately the issue involves a conflict between a client's right to counsel of his choice and the need to maintain ethical standards of professional responsibility. "The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. . . . [The client's recognizably important right to counsel of his choice] must yield to considerations of ethics which run to the very integrity of the judicial process." (Hull v. Celanese Corp. (2d Cir. 1975) 513 F.2d 568, 572.)[3]

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[3]We deem it appropriate that the court's attention to the applicability of rule 2-111(A)(4), or any other rule of professional conduct, be invited by a party to the proceedings. However, the rule is not intended to personally benefit such other party, or to aid counsel for such other party. The court is charged with taking discretionary action with or without a motion therefor when it is made to appear on considerations affecting an attorney, his client and the public trust, the attorney ought to testify as a witness, and no exception is applicable. Although it is urged the rule should be liberally construed to permit retention of an attorney who has acted in behalf of a client, construction of the rule is necessarily tempered by the express exceptions thereto.

When trial counsel foresees the possibility his continued representation of a client may fall within the prohibition of rule 2-111(A)(4) because he or a member of his firm ought to testify on behalf of such client at trial, he should resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel. (See ABA Code of Prof. Responsibility, EC 5-10.) Failing voluntary withdrawal by trial counsel in such situation a trial court is vested with broad discretion to order withdrawal. The court in the instant case acted well within the discretion vested in it by rule 2-111(A)(4) in its present form.[4]

The alternative writ is discharged and the petition is denied.

Clark, *J.*

We concur:
Mosk, *J.*
Richardson, *J.*
Newman, *J.*

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[4]Application of rule 2-111 is not limited to breaches of standards of conduct for which discipline may be imposed, although the rule manifestly has application for that purpose. (See Bus. & Prof. Code, §§ 6076, 6077.) We have this year held that a trial court has authority to recuse a prosecutor on the basis that he may be biased against a defendant. (People v. Superior Court (Greer) (1977) 19 Cal.3d 255.) We noted in that case: "It has long been established in civil cases that the court has the power, on motion of a party, to disqualify an opposing attorney from participating in a trial when, for example, the attorney improperly seeks to proceed against a former client. [Citations.]" (*Id.,* at pp. 263-264; see also Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564; Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal.App. 2d 919.) Although there may be greater reason for disqualifying an attorney in a conflict of interest case, the court nevertheless has authority to disqualify in any instance when, as here, the court reasonably deems it necessary to ". . . control in furtherance of justice, the conduct of its ministerial officers. . . ." (Code Civ. Proc., § 128; see People v. Superior Court, *supra,* 19 Cal.3d 255, 261, fn. 4.)

Dissenting Opinion by Manuel, J.

I respectfully dissent from the views presented by the majority. My reason for doing so is my belief that the trial court acted arbitrarily in applying a literal application of Rule 2-111(a)(4) without balancing the equities involved. In so doing, the trial court appears to have been merely enforcing a rule of professional conduct, a function better left to the State Bar, rather than determining if there existed any real impropriety threatening the integrity of the proceeding before it.

It is commonplace for attorneys to participate in the business-legal affairs of their clients, and this participation should be encouraged as part of the concept of preventive law. The instant case shows this involvement. Greene, a partner in the law firm of Loeb and Loeb and a specialist in their corporate department represented petitioner when the contract in question was first negotiated. His declaration was used in support of petitioner's application for preliminary injunction. For this prior participation, the trial court held that Rule 2-111(a)(4) of the State Bar of California Rules of Professional Conduct compelled a withdrawal of Loeb & Loeb from the case, the court stating: "I could not see how I could say with any degree of security or in good conscience that Mr. Greene would not be called as a witness."

Rule 2-111(a)(4) does not dictate so mechanical a result.[1] The majority states that the purpose of

[1]The history of Rule 2-111(a)(4), as commented on in People v. Guerrero (1975) 47 Cal.App.3d 441, 444, 448, is illustrative of its purpose and intent. The court therein stated: "In implementing Canon 5 of its Code of Professional Responsibility ('A lawyer should exercise independent professional judg-

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that requirement is to avoid the appearance of attorney impropriety. However, the avoidance of mere appearance should not be permitted to interfere with the substantial right to counsel of one's choice (1 Witkin, Cal. Procedure (2d ed. 1970) Juris. § 197, p. 728; Golden State Glass Corp. v. Sup. Ct. (1939) 13 Cal.2d 384, 396; Evans v. Sup. Ct. (1939) 14 Cal.2d 563, 581; People v. Brady (1969) 275 Cal.App.2d 984, 992), where there is no detriment to the opposing party

ment on behalf of a client'), the American Bar Association has promulgated this ethical consideration: 'EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.'

"The applicable disciplinary rules are DR 5-101(B) and DR 5-102(A): 'DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

"' . . .

"'(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

"'(1) If the testimony will relate solely to an uncontested matter.

"'(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

"'(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

"'(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

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or threat to the integrity and efficiency of the judicial process.

I urge, accordingly, that there was an abuse of discretion in the trial court's action against Loeb and Loeb. First, the record does not contain any inkling of harm or injury to defendants were the firm to continue its representation; indeed, on oral argument before this Court, their counsel could show no prejudice beyond a vacuous statement that he might have had to cross-examine a professional colleague. If there was harm in these circumstances, it was to Greene's credi-

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"DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

" '(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).'

"Effective January 1, 1975, new rules of professional conduct were adopted by the Board of Governors of the State Bar of California. We note in particular rule 2-111(A)(4):

" '(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the . . . [same four] circumstances . . .[as were enumerated in DR 5-101(B)(1) through (4)]"

The Court in *Guerrero, supra,* concludes: " 'The Code of Professional Responsibility takes a firm position that a lawyer should avoid testifying in court when he is the advocate. ABA Code DR 5-102. "Although his zeal as a lawyer might not influence his testimony as a witness, an ever critical public is only too apt to place such a construction upon it. A lawyer should avoid not only all improper relationships but should likewise, in order to maintain the profession in public confidence and esteem, avoid all relationships which may appear to be improper." ABA Comm. on Professional Ethics, Opinions, No. 50 (1931) (hereinafter cited ABA Opinions). See also Jackson v. United States, 297 F.2d 195, 196 (D.C. Cir. 1961).' "

bility as a witness, given his participation in the negotiations as the Comdens' attorney. Yet reason suggests that if a party is willing to accept less effective counsel because of the attorney's testifying, neither his opponent nor the trial court should be able to assert this choice against the party without clear evidence of detriment to the opponent or injury to the integrity of the judicial process. (Harris v. Superior Court (1977) 19 Cal.3d 786; cf. Martin v. ABC (Hayes) (1961) 55 Cal.2d 867 875-880; People v. Brady (1969) 275 Cal.App. 2d 984, 992; Smith v. Superior Court (1968) 68 Cal.2d 547, 560-562; People v. Loving (1968) 258 Cal.App.2d 84, 87; Cooper v. Sup. Ct. (1961) 55 Cal.2d 291, 301.) Mere recital of the rule should not be enough.

Secondly, if the reason underlying disqualification is primarily opposing counsel's difficulty in cross-examining a colleague, surely this handicap will exist whether Loeb and Loeb remains as the representing law firm or is suspended. If it is true that Mr. Greene ought to testify, then we can assume that at some point he is going to testify. Defendants have shown no more detriment will occur if petitioners are at that point represented by Loeb and Loeb, than if some other attorney is substituted in. Whatever hesitancy their counsel may have in the cross-examination of a professional colleague will be present in equal force no matter who represents the plaintiff Comdens.

Thirdly, we are dealing here with an action that is substantially equitable in nature.[2] It would seem

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[2]Petitioners sue for declaratory relief, injunctive relief and damages. Should defendants find that even on the legal issues, they will be prejudiced by a jury's discovering the relationship of Mr. Greene to Loeb and Loeb, perhaps they may make an appropriate motion or objection to prevent this disclosure. (Evid. Code, § 352.)

that the equitable issues will be heard by a trial judge, presumably competent, sitting without a jury, to filter out and put in true perspective whatever impropriety, real or imagined, might otherwise exist.

Finally, I would mention that we are concerned here with the rules promulgated by the State Bar with the approval of this Court which are to govern the conduct of attorneys and provide a basis for disciplinary action. These guidelines are not rules of practice promulgated by the Judicial Council to insure the integrity and efficiency of judicial process. Yet, the trial court has relied upon these Rules of Professional Conduct to impose what amounts to a pro tanto suspension of Loeb and Loeb's right to practice law. Moreover, the disqualification upheld herein does not preserve the integrity of the attorney-client relationship, (see e.g., Big Bear Municipal Water District v. Superior Court (1969) 269 Cal.App.2d 919), but destroys this relationship and deprives petitioners of representation of their own choosing. It is questionable whether the trial court has such authority where, as here, there has been no showing of a threat to the orderly proceeding of the court or to the judicial system. The trial court should not therefore involve itself in a matter better left to the State Bar to decide. (Jacobs v. State Bar (1977) 20 Cal.3d 191.)[3] I do not accord to this rule such exclusivity that it may be enforced only by the State Bar, but I submit that it can only be applied by a trial court to disqualify counsel where the trial court has manifest and palpable interests to

[3]". . . the interests of justice in this case involve not only the ethics of the lawyer but also the rights of his client. . . ." (J. P. Foley & Co., Inc. v. Vanderbilt (1975), Gurfein, J., concurring (2d Cir.) 523 F.2d 1357, 1360.)

protect. (See People v. Superior Court (Greer) (1977), 19 Cal.3d 255; People v. Guerrero, *supra*, 47 Cal.App.3d 444; cf. Gee v. State Personnel Board (1970) 5 Cal.App.3d 713.)

So important is the relation of attorney-client that the court should tread lightly in this area; and indeed, the burden should be on he who would disrupt that relation to provide the need to do so and to point out the precise grounds on which the court may exercise its discretion, if any, in severing the relationship.[4] Such a severance, therefore should only be imposed if to rule otherwise would be unfair to the opposing party or would directly threaten the integrity of the court.

Such considerations being absent from the instant case, I would issue a peremptory writ of mandate requiring respondent court to vacate its order of 10 February 1977 and enter a new and different order denying the motion of the real parties to disqualify the Comdens' counsel from participation in the case.

Manuel, *J.*

WE CONCUR:
Bird, *C. J.*
Tobriner, *J.*

[4]Justice Gurfein in his concurring opinion in J. P. Foley & Co., Inc. v. Vanderbilt, *supra* 523 F.2d 1357, 1360.) "After all, in cases that do not involve past representation, the attempt by an opposing party to disqualify the other side's lawyer must be viewed as a part of the tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism from possibly overcoming substantial justice to the parties. . . ."

APPENDIX B.

Opinion of the Court of Appeal of the State of California.

Opinion and Stay Order.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Barry Comden and Doris Day Comden, also known as Doris Day, Petitioners, vs. Superior Court of the State of California for the County of Los Angeles, Respondent. Doris Day Distributing Company, a California Corporation, LeRoy W. Rodde, Albert M. Sheppard, Marvin Valencia, and Anthony Strammiello, Real Parties in Interest. 2d Civ. 50531. (L.A.S.C. No. C 181219).

Filed: March 18, 1977.

Petition for writ of mandate. Writ granted.

Stanley M. Chernoff, Loeb & Loeb, and Robert A. Holtzman for petitioners.

No appearance for respondent court.

Cooper, Epstein & Hurwitz for real parties in interest.

Proceeding in mandate challenging the superior court's minute order of 10 February 1977 requiring petitioners' counsel, the law firm of Loeb and Loeb, to withdraw from the case within thirty days. On 22 November 1976, petitioners (Day) brought the original action for breach of a distributorship contract and for preliminary and permanent injunctions restraining defendants (Distributing Company) from continuing business activities in Doris Day's name. A partner in the law firm of Loeb and Loeb and a specialist in their corporate department, Marvin Greene, had represented Day when the distributorship contract in

question was first negotiated. Greene filed a declaration in support of Day's application for a preliminary injunction, describing meetings and telephone calls that had occurred during the contract negotiations and setting forth his opinion that some of Distributing Company's activities in selling franchises in Doris Day's name are not lawful. Day also filed declarations of co-counsel Stanley Chernoff, not a member of the firm, and of three associates in the firm of Loeb and Loeb, describing correspondence between Day and Distributing Company and alleging unlawful acts by the latter. Thereafter, at the hearing on the application for preliminary injunction on 26 January 1977, Distributing Company moved for an order disqualifying the law firm of Loeb and Loeb from representing Day on the ground that members of the firm who filed affidavits in support of the application for an injunction might be witnesses at the trial. The court granted the motion, giving as its reason that "I cannot see how I can say with any degree of security or in good conscience that Mr. Greene will not be called as a witness." The court said its decision was compelled by State Bar of California Rule of Professional Conduct 2-111(A) which, insofar as pertinent, provides:

> "(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:
>
> (a) If the testimony will relate solely to an uncontested matter, or

(b) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(c) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or

(d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."[1]

We think the trial court erred in concluding a law firm must cease to represent a client on a showing that a non-litigating member of the firm may possibly be called as a witness to testify on relatively routine matters. Here the law firm of Loeb and Loeb has represented Day in connection with the subject matter of the controversy since June 1976; they have developed knowledge and expertise relating to the parties' dealings and have expended hundreds of hours in preparing the case for trial, including extensive consultations with Day and with witnesses, which give rise to myriad ideas and intuitions that cannot readily be transferred to new counsel at this date. Unquestionably the exception of Rule 2-111(A)(4)(d) applies; loss of Loeb and Loeb as their counsel would now work a substantial

[1]Substantially similar provisions are found in ABA Disciplinary Rules 5-101B and 5-102A. To the same effect is Los Angeles County Bar Association Opinion 312, issued 25 June 1969, which provides that an attorney not conducting the trial may testify in a cause being tried by others in his firm when his testimony relates to matters occurring in the course of his professional duties and supports his client's position, or where it is important to retain the attorney's services due to his long familiarity with the case.

hardship on Day. Further, it is far from certain that Greene will in fact be called as a witness; and, even if he is, the exception of 2-111(A)(4) will operate, since he will take no part in the conduct of the trial.

In the California cases cited by Distributing Company, counsel were subject to disqualification because they had previously represented opposing parties in relevant matters and acquired confidential information that made it manifestly prejudicial and unethical for them now to represent their former clients' adversaries. (*Earl Schieb, Inc. v. Superior Court* (1967) 253 Cal. App.2d 703; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Big Bear Municipal Water District v. Superior Court* (1969) 269 Cal.App.2d 919.) At bench there has never been any relationship between Loeb and Loeb and Distributing Company. In the case of *Draganescu v. First National Bank of Hollywood* (5th Cir. 1974) 502 F.2d 550, the threatened testimony was by trial counsel, not a member of his firm, and the subject matter was not merely relevant and material but went to the heart of the case. Cases in federal trial courts have declined to disqualify an entire law firm on the ground that a non-litigating member might testify, where the court could not find any taint of unfairness to the party moving for disqualification. (See, e.g., *Greenebaum-Mountain Mtg. v. Pioneer Nat. Title Ins.*, 421 Fed.Supp. 1348 (D. Colo. 1976); see also *J.P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357 (2 Cir. 1975), regarding the question of hardship to the client.) So here, we find no taint of unfairness in the possibility that Greene may be called as a witness—in that he would not be the sole or principal witness, he would play no part in the conduct of

the trial, and his testimony would be merely peripheral and cumulative.

We note that under State Bar Rule 2-111(A)(4)(b), quoted above, a law firm may represent a party in litigation if a member of his firm will testify and "the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony." The phrase "matter of formality" clearly refers to routine rather than critical matters. For example, testimony by an attorney might be considered critical in the following situations: (1) an attorney who drew a will and witnessed its execution testifies as to its validity or interpretation; (2) an attorney testifies in a workman's compensation case against a legal secretary bringing an action against a firm member; (3) an attorney who is an eyewitness to a personal injury accident testifies as to the manner of its occurrence; (4) an attorney who drew a grant deed and presided over its execution and delivery testifies in an action to set the deed aside on ground of fraud or constructive trust; or (5) an attorney testifies to any fact which is materially in dispute and about which the attorney has acquired special confidential information by reason of his position or employment in related matters. On the other hand, testimony by an attorney about the holding of meetings at which many other persons were present and about the signing of contracts whose signing is not seriously disputed clearly relates to routine matters, such as the nature of any testimony that might be given by Greene. Accordingly the exception of 2-111(A)(4)(b) applies in this case and permits members of Greene's firm to conduct this litigation.

No case or ethical rule of which we are aware requires disqualification of a law firm because its members have filed affidavits at a law-and-motion stage of the proceedings.

Let a peremptory writ of mandate issue requiring respondent court to vacate its order of 10 February 1977 and enter a new and different order denying the motion of the real parties to disqualify petitioners' counsel from participation in the cause. Pending issuance of the writ, and until it takes effect, respondent court is restrained from enforcing its order of 10 February 1977 in *Barry Comden, et al. v. Doris Day Distributing Company, a California corporation, et al.*, (L.A.Sup.Ct.No. C181 219), requiring the law firm of Loeb and Loeb to withdraw from the case.

CERTIFIED FOR PUBLICATION.

Fleming, *J.*

We concur:

Roth, *P. J.*

Beach, *J.*

APPENDIX C.

California Business and Professions Code.

§ 6076. Rules of professional conduct; formulation

With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar in the State.

APPENDIX D.

Rules of Professional Conduct of the State Bar. of California.

Rule 2-111. Withdrawal from Employment

(A) In general.

(1) . . . .

(2) . . . .

(3) . . . .

(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:

(a) If the testimony will relate solely to an uncontested matter; or

(b) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(c) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or

(d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.